



S. 397 — The Protection of Lawful Commerce in Arms Act

Calendar No. 15

The bill was read for the second time on February 17, 2005, and placed on the Senate Legislative Calendar under General Orders.

Noteworthy

- On Friday, July 22, the Majority Whip moved to proceed to S. 397 and then filed a cloture petition on that motion.
- Per Senate Rule XXII, that cloture vote should occur on Tuesday, July 26. However, the Majority Whip previously filed cloture on S. 1042, the Department of Defense Authorization bill. If cloture is invoked on S. 1042, all post-cloture procedures (debate, vote on any amendments, and final passage) must be completed before the Senate can vote on the cloture petition for the motion to proceed to S. 397. The vote related to S. 397, therefore, could be as late as Wednesday or Thursday.
- This bill has 60 cosponsors (including 9 Democrats).
- S. 397 is very similar to S. 1805 of the 108th Congress. That bill was defeated 90-8 after poison-pill amendments were narrowly adopted. (See Roll Call Vote 30, March 2, 2004.)

Background

For the past decade, the U.S. firearms industry — from gun manufacturers to distributors to local sellers — has been under assault by legal activists attempting to hold the industry legally responsible for the criminal conduct of others. These lawsuits are not limited to individual or even class action claims, however. Since 1998, more than 30 cities and counties and one state have filed unprecedented lawsuits against the industry to demand compensation for the public costs associated with gun violence, such as police investigations, emergency personnel, public health resources, courts, and prisons.

Although many courts have rejected these lawsuits, anti-gun activists and government officials continue to press their claims. These suits expose the industry to heavy litigation expenses

and the risk of crippling judgments. In testimony before a House subcommittee in 2005, the General Counsel of the National Shooting Sports Foundation, Inc., stated, “I believe a conservative estimate of the total, industry-wide cost of defending ourselves to date now exceeds \$200 million. This is a huge sum for a small industry like ours. The firearms industry taken together would not equal a Fortune 500 company.”¹ Majority Leader Bill Frist recently said, “Without this legislation, it is possible the American manufacturers of legal firearms will be faced with the real prospect of going out of business, ending a critical source of supply for our Armed Forces, our police, and our citizens.”²

Three varieties of lawsuits plague the firearms industry:

Product Liability (Defective Product). Activists have alleged that many guns are defective products, even when produced as designed and used as intended. For example, in *Hurst v. Glock, Inc.*, plaintiffs alleged that a gun contained a product defect because it did not have a device to prevent a discharge when the ammunition magazine was removed (but where a bullet remained in the chamber). 684 A.2d 970, 971-972 (N.J. Super. App. Div. 1996).

Nuisance or Negligent Distribution and Marketing. Some lawsuits allege that manufacturers, distributors, and sellers have created a public nuisance by marketing firearms that are sometimes used illegally, or that they have been negligent in supplying guns to criminals. Plaintiffs argue that manufacturers, distributors, and sellers either know or should know that some guns will be used illegally, and so are responsible for any criminal misuse.

Deceptive Marketing or Advertising. These lawsuits contend that the industry engages in unfair business practices by allegedly misrepresenting the benefits of gun ownership. Plaintiffs contend that manufacturers, distributors, and sellers give what they allege is the false impression that gun ownership enhances personal safety.

The common thread in all these lawsuits is an attempt to hold gun manufacturers and distributors liable for injuries caused by illegal use of firearms by others. None of these lawsuits is aimed at the criminal wrongdoer who maims or kills another with a gun.

Key Bill Provisions

- S. 397 has two substantive provisions. First, § 3(a) states that “a qualified civil liability action may not be brought in any Federal or State court.” Second, § 3(b) orders the immediate dismissal of any “qualified civil liability action” pending on the date S. 397 becomes law.
- The key to S. 397 is the definition of “qualified civil liability action,” defined in § 4(5) as a lawsuit “brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages ... resulting from the criminal or unlawful misuse of a qualified product by a person or a third party.” A “qualified product” is a firearm as defined in § 4(4).

¹ Lawrence G. Keane, Senior Vice President and General Counsel, National Shooting Sports Foundation, Inc., in testimony before the House Judiciary Subcommittee on Commercial and Administrative Law, March 15, 2005.

² *Congressional Record*, July 21, 2005.

- The definition of “qualified civil liability action” then excludes five categories of lawsuits from coverage under S. 397. Thus, these exclusions preserve the viability of the following kinds of lawsuits.

— Excluded is “an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the transferee’s conduct.” See § 4(5)(A)(i).

— Excluded is “an action brought against a seller for negligent entrustment or negligence per se.” See § 4(5)(A)(ii). “Negligent entrustment” is defined in § 4(5)(B) as “the supplying of a qualified product by a seller for use by another person when the seller knows, or should know, the person to whom the product supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person and others.”

— Excluded is “an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought.” See § 4(5)(A)(iii). This exclusion includes cases involving knowingly making false entries in legally-required purchase records or making other false statements relating to sales, and aiding in the purchase of a firearm by a person legally barred from doing so.

— Excluded is “an action for breach of contract or warranty in connection with the purchase of the product.” See § 4(5)(A)(iv).

— Excluded is “an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except where the discharge of the product was caused by a volitional act that constituted a criminal offense then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.” See § 4(5)(A)(v).

- Significant Changes from S. 1805 as Considered in the 108th Congress

The significant changes from the 108th Congress include (a) changes to the findings and purpose; (b) an expansion of the proposed immunity to suits for punitive damages, penalties, and equitable relief; (c) the addition of a “knowledge” requirement in § 4(5)(A)(iii); (d) the addition of a criminal offense exception to the product defect exclusion in § 4(5)(A)(v); and (e) a revised definition of “trade association” in § 9.

Administration Position

At press time, the Administration has not issued a Statement of Administration Policy (“SAP”) for S. 397.

Possible Amendments

The full scope of amendments is not known at this time. However, during debate on S. 1805 during the 108th Congress (from February 26 to March 2, 2004), the Senate took votes on (or to table) the following:

- a Feinstein amendment relating to an “Assault weapons” ban;
- a McCain/Reed amendment related to “gun shows” (regarding criminal background checks at special firearm events);
- a Kohl gun safety amendment;
- a Mikulski amendment and a Frist/Craig amendment regarding the bill’s applicability to lawsuits associated with the D.C.-area sniper incidents of 2002;
- a Corzine amendment and a Frist/Craig amendment regarding the bill’s applicability to lawsuits brought by police officers;
- a Campbell amendment exempting qualified current and former law enforcement officers from state laws prohibiting the carrying of concealed handguns;
- a Kennedy amendment and a Frist/Craig amendment regarding “armor-piercing bullets”;
- a Levin amendment to expand the categories of suits permitted by allowing lawsuits based on gross negligence or reckless conduct; and
- a Bingaman amendment to change the definition of “reasonably foreseeable”.

More information on the above amendments is available through the Republican Policy Committee’s “Record Vote Analyses,” available to Republican staff at the Senate Republican Policy Committee (SR-347) and online at <http://gop.senate.gov> (under the RPC tab). The relevant Roll Call Votes from the 108th Congress are numbered 16-30.

As information becomes available about the likelihood of additional amendments such as those above, the RPC will circulate amendment summaries to Republican staff.